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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 985

CHARLES J. CULLIGAN,

Petitioner,

vs.

THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

ROBERT C. HANDWERK,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 985

CHARLES J. CULLIGAN,

Petitioner,

vs.

THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI TO REVIEW JUDGMENT OF THE COURT OF CLAIMS

The petitioner respectfully shows to the Court, as follows:

SUMMARY AND STATEMENT OF MATTER INVOLVED

1. This matter involves a suit filed by petitioner in the court below to recover judgment in the sum of $17,397, with interest, representing salary due him as a former letter carrier on duty in Atlantic City, N. J., it being alleged that he was removed from his position as such without just cause and a hearing under the statute hereinafter cited, and that said statute has been construed to require a hearing thereunder. Petitioner was never given an opportunity to fully present facts showing his innocence of the

charges against him, but was arbitrarily dismissed by the Post Office Department.

STATUTE INVOLVED

The statute involved is Sec. 6 of the Act of August 24, 1912; 37 Stat. 555, the relevant part of which reads as follows:

> "That no person in the classified civil service of the United States shall be removed therefrom except for such cause as will promote the efficiency of said service and for reasons given in writing, and the person whose removal is sought shall have notice of the same and of any charges preferred against him, and be furnished with a copy thereof, and also be allowed a reasonable time for personally answering the same in writing; and affidavits in support thereof; but no examination of witnesses nor any trial or hearing shall be required except in the discretion of the officer making the removal; and copies of charges, notice of hearing, answer, reasons for removal, and of the order of removal shall be made a part of the records of the proper department or office, as shall also the reasons for reduction in rank or compensation; and copies of the same shall be furnished to the person affected upon request, and the Civil Service Commission also shall, upon request, be furnished copies of the same: * * *"

QUESTIONS PRESENTED

1. Can a regular letter carrier legally be dismissed under said statute without a hearing within the meaning of the 5th Amendment of the Constitution of the United States, stating in part that no person shall be deprived of life, liberty, or property, without due process of law?

2. Can said Amendment be so construed as to leave Congress free to make any process, "due process of law," by its mere will. See *Murray* v. *Hoboken Land, etc. Co.*, 18 How. 277.

3. Wasn't petitioner's contract with the respondent canceled and terminated by depriving him of property without due process of law?

4. Isn't said statute conflicting in that while it provides that no hearing shall be required, it later mentions a notice of hearing? The statute should be construed liberally in favor of the accused person with right accorded for a personal hearing on the merits.

5. Do the terms of said statute fulfill the said requirements of Amendment 5 to the Constitution as to due process of law, or is said statute unconstitutional, Congress having violated the limitations placed upon it by said provisions of the Fifth Amendment.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

The writ should issue for the following reasons:

1. The lower court erred in construing the statute to the effect that a hearing was not required before removal of petitioner. The statute was construed to require a hearing in the case of *United States, ex rel., Newcomer* v. *Postmaster of City of Buffalo,* 221 Fed. Rep. 687.

2. The court erred in holding the statute constitutional and that it did not violate the 5th Amendment to the Constitution of the United States, the petitioner alleging in his petition that he was deprived of property without due process of law. The judicial department of the Government is governed in the exercise of its functions by the rule of due process of law. See *Hovey* v. *Elliott,* 167 U. S. 409.

3. The court erred in dismissing the petition and denying petitioner the right to trial and judgment on the merits. In doing so he was denied due process of law.

4. In *United States* v. *Elchibegoff*, No. 442, October Term, 1946, this Court allowed a writ to issue on petition for certiorari. In that case, the record shows, Elchibegoff had asked for a hearing under the same statute. He was allowed to recover in the Court of Claims. Petitioner is advised that the case was recently dismissed by this Court at the request of the United States, thus again leaving the questions, as here involved, unsettled. It is, therefore, respectfully requested that the writ should issue in the case at bar in order to finally settle and determine the matters heretofore stated.

Respectfully submitted,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 3–4) has not yet been reported.

JURISDICTION

The judgment of the Court of Claims was entered on November 4, 1946 (R. 4). The petition for a writ of certiorari was filed on February 4, 1947. The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended.

QUESTION PRESENTED

Whether a person who was removed from a civil service position in compliance with the provisions

of the Act of August 24, 1912, may, after more than fifteen years have elapsed, maintain an action in the Court of Claims for salary.

STATUTE INVOLVED

Section 6 of the Act of August 24, 1912, 37 Stat. 539, 555, 5 U. S. C. 652, provides in pertinent part as follows:

> That no person in the classified civil service of the United States shall be removed therefrom except for such cause as will promote the efficiency of said service and for reasons given in writing, and the person whose removal is sought shall have notice of the same and of any charges preferred against him, and be furnished with a copy thereof, and also be allowed a reasonable time for personally answering the same in writing; and affidavits in support thereof; but no examination of witnesses nor any trial or hearing shall be required except in the discretion of the officer making the removal; and copies of charges, notice of hearing, answer, reasons for removal, and of the order of removal shall be made a part of the records of the proper department or office, as shall also the reasons for reduction in rank or compensation; and copies of the same shall be furnished to the person affected upon request, and the Civil Service Commission also shall, upon request, be furnished copies of the same.

Rule XII, Section 1, of the Civil Service Commission is substantially the same as the above portion of Section 6.[1]

STATEMENT

The facts alleged by the petitioner in the court below (R. 1–2) are substantially as follows:

The petitioner, Charles J. Culligan, was appointed on May 7, 1919, as a substitute city letter carrier in the post office at Atlantic City, New Jersey, from which position he resigned on March 25, 1920 (R. 1). He was reappointed on June 1, 1921, as a substitute carrier and was promoted to regular carrier October 1, 1923, serving as such until January 10, 1931, when, he alleged, he was removed without just cause (R. 1). He stated that he had had various bills introduced in Congress for relief but they always failed to pass because of adverse recommendations of the Post Office Department, and that he had repeatedly taken action in the Post Office Department but was always arbitrarily turned down (R. 1).

On July 19, 1946, he filed a petition in the Court of Claims alleging that he was removed from his position as a mail carrier "without a hearing on the charges, and without due process of law" (R. 1). He claimed back salary from January 10, 1931, to July 9, 1942, at $2,100 per year, or $24,325, less the sum of $6,928 which he had

[1] See Civil Service Act, Rules and Regulations Annotated (1943), p. 283.

earned at a lower salary during that period, making his total claim $17,397 (R. 1). He further alleged that since July 9, 1942, he has earned more than he earned as a regular mail carrier and has therefore suffered no further loss (R. 1).

The court below sustained the defendant's demurrer to the petition stating with reference to the Act of August 24, 1912, and petitioner's allegations (R. 4):

> This statute does not require that a civil servant shall be granted a hearing before removal. In fact, it says the contrary. The statement in the petition that the plaintiff was removed without just cause does not state a ground of recovery since we have no power to review the causes of removal of civil servants, if the procedural requirements are complied with. *Eberlein* v. *United States,* 53 C. Cls. 466; *Arthur S. Kellom* v. *United States,* 55 C. Cls. 174. The statement in the petition that the plaintiff was removed without due process of law is only a statement of a legal conclusion, which adds nothing to the petition.

ARGUMENT

Section 6 of the Act of August 24, 1912, specifies the procedure to be followed in removals from the classified civil service.[2] It provides that no person in the classified civil service shall be removed

[2] See Civil Service Act, Rules and Regulations Annotated (1943), p. 180.

except for such cause as will promote the efficiency of the service and for reasons given in writing, that the person whose removal is sought shall have notice of the same and of any charges preferred against him, and that he be furnished with a copy thereof and be allowed a reasonable time for personally answering the same in writing with supporting affidavits. There is no allegation in his petition in the court below (R. 1–2) nor does petitioner here contend that any of the above procedural requirements of the Act of 1912 were not complied with. His contentions are that the Act requires that he be given a hearing before he can be removed and that if the Act is held not to require a hearing it violates the Fifth Amendment to the Constitution.

1. The Act clearly and unequivocally provides that no hearing in removals from the classified civil service are required. It states that "no examination of witnesses nor any trial or hearing shall be required except in the discretion of the officer making the removal." See *Nicholas* v. *United States,* 257 U. S. 71, 75; *Golding* v. *United States,* 78 C. Cls. 682, 684, certiorari denied, 292 U.S. 643.[3] It is clear, therefore, that the Act did

[3] The case of *United States ex rel. Newcomer* v. *Postmaster of City of Buffalo,* 221 Fed. 687 (W. D. N. Y.), cited by petitioner (Pet. 3), did not involve the question of removal from the classified civil service but rather was a case in which a person had resigned and later "applied for reinstatement under civil service rule 9, which substantially provides for reinstatement in the departments in which they formerly

not confer upon petitioner the right to a hearing and that no procedural requirements were violated in effecting his removal as a mail carrier. In these circumstances the court below properly sustained defendant's demurrer to the petition (R. 2) on the ground that no cause of action was stated and held that it had "no power to review the causes of removal of civil servants, if the procedural requirements are complied with" (R. 4). *Keim* v. *United States,* 177 U. S. 290; *Burnap* v. *United States,* 252 U. S. 512; *Eberlein* v. *United States,* 257 U. S. 82; *United States ex rel. Taylor* v. *Taft,* 24 App. D. C. 95, writ of error dismissed, 203 U. S. 461; *Levine* v. *Farley,* 107 F. 2d 186 (App. D. C.), certiorari denied, 308 U. S. 622; *Kellom* v. *United States,* 55 C. Cls. 174; *Golding* v. *United States,* 78 C. Cls. 682, certiorari denied, 292 U. S. 643; *Bennett* v. *United States,* 89 C. Cls. 322; *Bratton* v. *United States,* 90 C. Cls. 604; *Baskin* v. *United States,* 95 C. Cls. 455, certiorari denied, 316 U. S. 675.[4]

2. Petitioner's contention that the Act would be unconstitutional in violation of the Fifth Amend-

served of men separated without delinquency or misconduct on their parts from competitive positions" (221 Fed. at 689).

[4] The instant case is sharply distinguishable from *Elchibegoff* v. *United States,* 106 C. Cls. 541, writ of certiorari dismissed February 3, 1947 (No. 442, this Term). Recovery was allowed in that case because of the failure of the government officials to follow the procedural requirements prescribed by the Act of 1912 in dismissing the employee. Here the procedural requirements were followed.

ment if it does not unconditionally provide for a hearing (Pet. 3) is obviously without merit. Prior to the enactment of the statute here involved, petitioner could have been removed arbitrarily, without the procedural safeguards provided by the Act of 1912. *Carr* v. *Gordon,* 82 Fed. 373 (C. C. N. D. Ill.); *Flemming* v. *Stahl,* 83 Fed. 940 (C. C. W. D. Ark.); *Morgan* v. *Nunn,* 84 Fed. 551 (C. C. M. D. Tenn.); *United States ex rel. Palmer* v. *Lapp,* 244 Fed. 377 (C. C. A. 6); *Ruggles* v. *United States,* 45 C. Cls. 86. This result followed from the principle, repeatedly enunciated by this Court, that the power to appoint carries with it the power to remove. *Ex parte Hennen,* 13 Pet. 230; *Keim* v. *United States,* 177 U. S. 290; *Reagan* v. *United States,* 182 U. S. 419; *Burnap* v. *United States,* 252 U. S. 512; *Eberlein* v. *United States,* 257 U. S. 82. The Act of 1912 was passed for the purpose of erecting safeguards to preclude the arbitrary removal of civil service employees. Petitioner's contention, therefore, comes to this, that the statute is unconstitutional because, although it extends to him certain protections, it does not provide him with more. Since it is clear that in the absence of the Act of 1912 he was not entitled as of right to a hearing prior to removal, it obviously follows that the statute is not constitutionally defective for not adding to his rights in that respect.

3. Furthermore, it is submitted that, even assuming *arguendo* that petitioner initially had a cause of action, his claim is now barred by laches. Although his removal occurred on January 10, 1931, more than fifteen years elapsed before he instituted action in the court below on July 19, 1946.[5] An employee or officer of the United States who has been discharged must use diligence in asserting his right to the office or to the compensation attached to it. Failure to act diligently constitutes laches barring recovery. *Arant* v. *Lane,* 249 U. S. 367, 372 (twenty months); *Nicholas* v. *United States,* 257 U. S. 71, 76 (three years); *Norris* v. *United States,* 257 U. S. 77, 80–81 (eleven months); *Caswell* v. *Morgenthau,* 98 F. 2d 296, 298 (App. D. C.), certiorari denied, 305 U. S. 596 (eighteen months); *United States ex rel. Cromwell* v. *Doyle,* 99 F. 2d 448 (App. D. C.), certiorari denied, 306 U. S. 640 (thirty months); *Bennett* v. *United States,* 89 C. Cls. 322, 326 (three years).

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[5] It is of course clear that at least that portion of petitioner's claim which arose prior to July 19, 1940, is barred by the applicable six-year statute of limitations. Section 156 of the Judicial Code, 28 U. S. C. 262. See *Ylagan* v. *United States*, 101 C. Cls. 294, certiorari denied, 322 U. S. 763; *Sayers* v. *United States*, 102 C. Cls. 791; *Moriarty, Inc.* v. *United States*, 97 C. Cls. 338.

CONCLUSION

The decision below is correct, and there is no conflict of decisions. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

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